

AMAN PALESTIN BHD v. TAN SRI DATO' SRI
HJ AZAM BAKI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-35-01-2024]
1 JULY 2024

Abstract – *Matters that are not amenable to judicial review are, amongst others: (i) matters that are not justiciable; (ii) there is an alternative remedy or more appropriate remedy; or (iii) the matter is an exercise of power in criminal investigations. Hence, an exercise of power in relation to a criminal investigation is not open to judicial review, save where mala fide is shown, for otherwise, the criminal investigative process of the law enforcement agencies would be exposed to constant judicial review, which is not the intention of Parliament and is against public interest.*

ADMINISTRATIVE LAW: *Judicial review – Application for leave – Freezing orders by Malaysian Anti-Corruption Commission under s. 44(1) of Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether decision while conducting criminal investigation not amenable to judicial review – Whether decision made in bad faith could be subjected to judicial review – Whether legitimate exercise of investigative power – Whether bad faith or abuse of investigative powers pleaded – Whether freezing order amenable to judicial review*

CIVIL PROCEDURE: *Judicial review – Application for leave – Freezing orders by Malaysian Anti-Corruption Commission under s. 44(1) of Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether decision while conducting criminal investigation not amenable to judicial review – Whether decision made in bad faith could be subjected to judicial review – Whether legitimate exercise of investigative power – Whether bad faith or abuse of investigative powers pleaded – Whether freezing order amenable to judicial review*

The applicant sought and received donations from the public in the name of the Middle East humanitarian cause, in particular, the Palestinian people. On 17 October 2023, the applicant's representatives, the Chief Executive Officer ('CEO') together with other eight persons were called by the Malaysian Anti-Corruption Commission ('MACC') to give statements for the purpose of investigation into money laundering under the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUA') and the Malaysian Anti-Corruption Commission Act 2009, in respect of the said donations. The MACC had subsequently frozen a number of bank accounts owned by the applicant and other related companies. The MACC also issued and served on the applicant, a notice

- A under s. 44(1) of the AMLATFPUA freezing 11 bank accounts which were under the name of the applicant, and one account under the name of Tabung Wanita dan Kanak-Kanak Palestine. In letters dated 27 November 2023 and 9 January 2024, the applicant requested that the freezing orders be lifted or alternatively, varied under s. 44A of the AMLATFPUA. There was no response and hence, the instant application by the applicant for leave to commence judicial review proceedings, in the main, to quash the freezing orders or alternatively, to vary the freezing orders. The grounds for review were: (i) the freezing orders were illegal and *ultra vires* the AMLATFPUA on the basis that the MACC had no reasonable ground to suspect that the applicant had financed or was financing or will be financing terrorism committing, or that the monies frozen were proceeds of an illegal activity. As such, the notices issued to freeze the applicant's accounts did not come within the scope of s. 44(1) of the AMLATFPUA; (ii) the applicant was denied the right to be heard and/or be informed of the reasonable suspicion before the freezing orders were made; (iii) the decision refusing to revoke or vary the freezing orders was unreasonable and was in bad faith.
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Held (dismissing application for judicial review):

- (1) A criminal investigation is under the purview of the Executive and therefore an executive act. Executive decisions made by a public authority pursuant to statute or prerogative are all generally reviewable under the supervisory jurisdiction of the High Court by the remedy of judicial review or known as statutory judicial review, as opposed to constitutional judicial review. However, certain executive decisions are not amenable to judicial review. In instances where an investigation officer takes a certain course of action or had made a decision in the course of conducting a criminal investigation, such action or decision is not amenable to judicial review, unless the decision is made in bad faith. On the other hand, in a legitimate exercise of investigative power, the courts are reluctant to delve into reviewing decisions taken while conducting criminal investigations because such action would expose enforcement agencies, whose function is to arrest crime and protect the public and jeopardise the investigation into criminal offences. (paras 17-19 & 23)
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- (2) There was no pleading of bad faith or abuse of investigative powers or to any act that falls within the scope of such complaint raised. The exercise of investigative power proceeded upon a complaint of wrongdoing by the applicant and the issuance of the freezing orders was done under s. 44(1) of the AMLATFPUA. Therefore, the issuance of the freezing orders was not amenable to judicial review. (para 42)
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- (3) Section 44(1) of the AMLATFPUA permits the enforcement agency to issue the freezing order of monies held in accounts in financial institutions while s. 50(1) of the AMLATFPUA is for a different

purpose, *ie*, seizure of such monies in such accounts. Under s. 50(1) of the AMLATFPUA, the Public Prosecutor's order is for the investigating officer of the enforcement agency to seize the monies. Thus, both ss. 44 and 50 show the different roles of the investigation officer and the Public Prosecutor. In the present case, there was only a freezing order issued by the MACC under s. 44(1) of the AMLATFPUA. There was no seizure order issued to the applicant. Therefore, the applicant's contention, that the investigation officer had acted illegally by issuing the freezing orders as it was within the Public Prosecutor's power under s. 50(1), was flawed and misconceived in law. (paras 44 & 47)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC (*refd*)

City Growth Sdn Bhd & Anor v. The Government Of Malaysia [2005] 7 CLJ 422 HC (*dist*)

Datuk Kapten (B) Muhammad Suhaimi Yahya & Anor v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] CLJU 1150; [2023] 1 LNS 1150 HC (*refd*)

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC (*refd*)

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor [2018] MLJ Supp 16 (*foli*)

Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] 3 CLJ 653 FC (*refd*)

I-Serve Online Mall Sdn Bhd & Ors v. Bank Negara Malaysia & Ors [2022] CLJU 2700; [2022] 1 LNS 2700 HC (*refd*)

Khor Peng Chai & Ors v. Bank Negara Malaysia & Anor [2012] 4 CLJ 987 HC (*dist*)
Lembaga Minyak Sawit Malaysia & Anor v. Immovans Palm Industries Sdn Bhd [2023] 3 CLJ 715 CA (*refd*)

Sim Kie Chon v. Superintendent Of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC (*refd*)

Simplex Sdn Bhd lwn. Mohd Samsol Md Muzer & Satu Lagi [2014] CLJU 1278; [2014] 1 LNS 1278 HC (*dist*)

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC (*refd*)

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017] 10 CLJ 1 FC (*foli*)

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC (*refd*)

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 44(1), 44A, 50(1)

Federal Constitution, arts. 125, 145(3)

Government Proceedings Act 1956, s. 9(1)

Malaysian Anti-Corruption Commission Act 2009, s. 30(1)(a)

For the applicant - Muhammad Rafique Rashid Ali, Nizam Bashir Abdul Kariem Bashir & Nurmustanir Md Nor; M/s Law Practice of Rafique

For the respondent - Ahmad Hanir Hambaly & Nur Irmawatie Daud; SFCs

Reported by S Barathi

A JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

B [1] The applicant, Aman Palestin Berhad, is a company whose 11 bank accounts were frozen by notices (“freezing orders”) issued by an investigating officer of the Malaysian Anti-Corruption Commission (“MACC”), namely the fourth respondent, under s. 44(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (“Act 613”).

C [2] On 31 January 2024, the applicant applied for leave to commence judicial review proceedings to quash the freezing orders and an order of *mandamus* compelling the variation of the freezing orders under s. 44A of the Act 613 so that a sum of RM11,026,215.60 is released for the applicant’s daily expenses, payment of salaries, administration, operation and missions for the period of three months, and consequential relief and damages.

D [3] On 21 March 2024, I refused the leave sought and dismissed the application. This judgment contains the reasons for my decision.

Background Facts

E [4] The applicant had sought for and received donations from the public in the name of the Middle East humanitarian cause, in particular, the Palestinian people. On 17 October 2023, the applicant’s representatives, *ie*, Chief Executive Officer (“the CEO”) together with other eight persons were called by MACC to give statements for the purpose of investigation into money laundering under Act 613 and the Malaysian Anti-Corruption Commission Act 2009 (“the MACC Act”) in respect of the said donations. The applicant knew what the purpose of the investigation was as on 21 November 2023 called a press conference wherein the CEO denied any wrongdoings by the applicant. It was stated that the 8% of the donations received which were used for operational costs was a reasonable sum. It was also stressed that at no time were any of the monies used for personal benefit or anything done against the objectives of incorporation of the applicant.

H [5] Two days later, on 23 November 2023, in a media statement, the MACC stated that early investigations and statements of witnesses revealed that there was misappropriation of funds amounting to about RM70 million, which was also against the objectives of setting up the applicant company. As such, to facilitate investigations, the MACC had frozen a number of bank accounts owned by the applicant and other related companies. On the same day, the MACC issued and served on the applicant a notice under s. 44(1) of Act 613 freezing 11 bank accounts, which were under the name of the applicant, and one account under the name of Tabung Wanita dan Kanak-Kanak Palestine.

[6] In letters dated 27 November 2023 and 9 January 2024, the applicant requested that the freezing orders be lifted or alternatively, varied under s. 44A of Act 613. There was no response to these letters. As a result, the applicant filed the instant application for leave to commence judicial review proceedings to, in the main, quash the freezing orders or alternatively, to vary the freezing orders.

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The Test For Leave

[7] The law is trite. The test applicable in determining the grant or otherwise leave to commence judicial review proceedings was laid down by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296. The test said that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider was attached, *ie*, unless the matter for judicial review is amenable for judicial review absolutely no success may be envisaged. Thus, the threshold is very low unless the matter is not amenable to judicial review.

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[8] Matters that are not amenable to judicial review according to decided cases, amongst others, are: (i) matters that are not justiciable; (ii) there is an alternative remedy or more appropriate remedy; or (iii) the matter is an exercise of power in criminal investigations.

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[9] Cases decided under the category (iii) above include *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor* [2017] 10 CLJ 1; *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2018] Supp MLJ 16; *Simplex Sdn Bhd lwn. Mohd Samsol Md Muzer & Satu Lagi* [2014] CLJU 1278; [2014] 1 LNS 1278; [2015] 9 MLJ 78; and *Khor Peng Chai & Ors v. Bank Negara Malaysia & Anor* [2012] 4 CLJ 987.

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The Grounds Of Review

[10] In the amended O. 53 statement, the grounds of reviewing the decision of the fourth respondent, the investigating officer, were as follows:

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(i) the freezing orders were illegal and *ultra vires* Act 613 on the basis that the MACC had no reasonable ground to suspect that the applicant had financed or was financing or will be financing terrorism committing, or that the monies frozen were proceeds of an illegal activity. As such, the notices issued to freeze the applicant's accounts did not come within the scope of ss. 44(1) of Act 613.

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(ii) the applicant was denied his right to be heard and/or be informed of the reasonable suspicion before the freezing orders were made against him.

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(iii) the decision refusing to revoke or vary the freezing orders was unreasonable and was in bad faith.

A The Attorney General's Objections

[11] Senior Federal Counsel ("SFC"), who appeared on behalf of the Attorney General, submitted in his written submissions dated 13 February 2024 that the freezing orders were not amenable to judicial review. The power to issue the freezing orders was one of the mechanisms for criminal investigation provided under Part VI of Act 613, namely s. 44(1). In support, learned SFC cited *Empayar Canggih* which held that an exercise of power in relation to a criminal investigation is not open to judicial review, for otherwise the criminal investigative process of all law enforcement agencies would be exposed to constant judicial review, which was not the intention of Parliament and against public interest.

[12] Learned SFC also cited *Latheefa Beebi Koya*, which held that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the MACC Act, in order to assist the ongoing criminal investigation, was not amenable to judicial review save where *mala fide* is shown.

[13] The following cases, which were on point, were also cited: *Simplex Sdn Bhd, Khor Peng Chai and City Growth Sdn Bhd & Anor v. The Government Of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581. These cases dealt with provisions of ss. 44(1) and 50(1) of Act 613 in the form they were prior to the amendment. Nevertheless, the principle remains the same and remains applicable after the amendments. In all these cases, leave was refused on the grounds that judicial review of the criminal investigation process was not amenable to judicial review.

F Analysis And Decision

[14] There were three submissions made by the applicant. I will address each one of them under separate headings.

Decision Taken In Criminal Investigation Is A Public Function

[15] It was submitted that since the decision to issue the freezing orders under s. 44(1) of Act 613 was a public function pursuant to a written law made by a public authority (*ie*, the investigation officer here), the decision is subject to control by way of judicial review and on this basis without more such decision is amenable to judicial review. The applicant relied on the following passage in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 to support its contention:

[6] ... let us begin by setting out the common law which accepts that the High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out *quasi-judicial* functions or charged with the performance of public acts and duties. The High Court does it by way of judicial review. In brief, judicial review provides a means by which judicial control of administrative action is exercised – see *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374 @ 408 ("*CCSU*")

[16] I disagree. The passage and also if one were to look at p. 408 of the *CCSU* case referred to in the said passage clearly does not support the applicant's submission. The passage merely sets out the governing principle that the court possesses supervisory jurisdiction, exercised by way of judicial review, to control administrative and *quasi*-judicial action by inferior courts, tribunals, and other bodies or persons. This passage does not address the issue of whether a decision or action which would ordinarily be reviewable is not "amenable to judicial review", in particular, decisions made when conducting criminal investigations under written law.

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[17] It is trite that a criminal investigation is under the purview of the Executive and therefore an Executive act. The law is trite. Executive decisions made by a public authority pursuant to statute or prerogative are all generally reviewable under the supervisory jurisdiction of the High Court by the remedy of judicial review or known as statutory judicial review as opposed to constitutional judicial review. The remedy acts as a check to ensure that public bodies and authorities have exercised their Executive powers or functions lawfully as required by law. However, not all Executive decisions are amenable to judicial review (*Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321).

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[18] There are instances that the courts have held that certain Executive decisions are not amenable to judicial review. These are decided on a case-to-case basis depending on the subject matter or function being performed of the Executive action, which includes matters such as those concerning national security, entering into treaties with other Governments, prerogative of mercy, policy matters, management prerogative, and decisions taken while conducting criminal investigations.

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[19] Specifically, in instances where an investigation officer takes a certain course of action or had made a decision in the course of conducting a criminal investigation, the courts have held that this is a species of action or decision not amenable to judicial review unless the decision is made in bad faith (see *Latheefa Beebi Koya*).

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[20] Thus, being a public law matter by virtue of a decision, action, or omission taken under a written law by a public officer or authority merely provides that the remedy of judicial review is the appropriate remedy. A matter that is susceptible to judicial review is one thing while the issue of whether an Executive decision, such as in the instant case, is a totally separate matter. It is an issue that arises at the leave stage, where the court has to make a determination whether leave ought to be granted or not.

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Reference To Recent Cases By Way Of Analogy

[21] It was submitted, by referring to certain recently decided cases by way of analogy, that there is no absolute or unfettered discretion when an investigation officer makes decisions while conducting a criminal

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A investigation. The first two cases concerned decisions made by the Attorney General while the last case concerned carrying out and completing a criminal investigation against a superior court judge.

[22] It is to be observed that not one of the three cases referred to by the applicant concerned a decision taken in a criminal investigation. More
B importantly, the cases did not consider the cases on point where it has been held that decisions taken while conducting a criminal investigation are not amenable to judicial review. The cases on point are *Simplex Sdn Bhd*, *Khor Peng Chai*, and *City Growth*, which all concerned legitimate exercise of investigative power by enforcement authorities. These cases were approved
C by the Federal Court in *Empayar Canggih* and *Latheefa Beebi Koya*.

[23] A close reading of these cases reveals that where the exercise of investigative power was not legitimate, *ie*, not a genuine investigation or done in bad faith, such decisions can be challenged by way of judicial review. On the other hand, in a legitimate exercise of investigative power, the courts,
D according to the above cases are reluctant to delve into reviewing decisions taken while conducting criminal investigations because such action exposing enforcement agencies whose function is to arrest crime and protect the public would jeopardise the investigation into criminal offences which is something not in the public interest (see *Empayar Canggih*, *Latheefa Beebi Koya*, *Khor Peng Chai*, *Simplex Sdn Bhd*, and *City Growth Sdn Bhd*).
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[24] I now address the three cases referred to by the applicant.

Chin Chee Kow

[25] The first case is *Chin Chee Kow*. There, the argument made was that
F the Attorney General's exercise of discretion under s. 9(1) of the Government Proceedings Act 1956, like its discretion under art. 145(3) of the Federal Constitution is not amenable to judicial review. The Federal Court made short work of this argument. The exercise of discretion was not one made under art. 145(3) of the Federal Constitution, where different
G considerations apply. Under s. 9(1) of the Government Proceedings Act 1956, the Attorney General is conferred discretion to give or not to give his consent to two or more interested persons to institute a suit or be joined as a party in any existing suit, on behalf of the public in relation to a public, religious, social or charitable trust.

H [26] The Federal Court agreed with the reasoning of the Court of Appeal, which forms the *ratio decidendi* of the case:

[The] application was for a judicial review on the refusal of the Attorney General to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the Attorney General has unfettered discretion in relation to the prosecution of criminal offence based on Article 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal. ... there cannot be any absolute discretion in civil
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law particularly when it involves the public, as this can lead to abuse. ... the Attorney General's decision, just like other decisions of decision makers, should be subject to the court's supervising powers. (emphasis added) A

[27] Therefore, *Chin Chee Kow* is easily distinguishable from the instant case as the case established that, if the Attorney General is making any decision under any written law, apart from the discretion conferred under art. 145(3) of the Federal Constitution, that decision is subject to review by the High Court just like any other decision susceptible to judicial review. B

[28] Further, in my view, the reliance on *Chin Chee Kow* epitomises the failure to appreciate the other governing principle, *ie*, that not all decisions, actions, or omissions of a public body or authority are amenable to judicial review. *WRP Asia Pacific* in setting out the test for leave to commence judicial review proceedings makes this clear. The test requires that the subject matter of the review is also one that is amenable to judicial review. In this regard, the Supreme Court in *Sim Kie Chon v. Superintendent Of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 considered the nature of the function of the decision as a factor that determines whether a matter is amenable to judicial review in the following words: C

In our view such power is a power of high prerogative of mercy which is an executive act but **by its very nature is not an act susceptible or amenable to judicial review** (See *Council of Civil Service Unions And Others v. Minister For The Civil Service* [1984] 3 All ER 935). (emphasis added) D

[29] Lastly, in *Chin Chee Kow*, itself, the Federal Court said:

There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. *Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. (emphasis added) E

[30] The courts are reluctant to delve into the reviewing the criminal investigation process is because of this reason – the criminal investigative process of all law enforcement agencies would be exposed to constant judicial review and jeopardise the investigation into criminal offences, which is against the public interest in combating crime (see *Empayar Canggih, Latheefa Beebi Koya, Khor Peng Chai, and City Growth Sdn Bhd*). F

Sundra Rajoo

[31] The second case is *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209. This case concerned the Attorney General's prosecutorial discretion under art. 145(3) of the Federal Constitution. For the first time, the Federal Court made a very G

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A narrow and restrictive inroads into the principle that the discretion of the Attorney General to prosecute is not amenable to judicial review. This is seen in the following paragraphs in *Sundra Rajoo* as summarised below.

B [32] In para. [108], it was stated the general principle that whether the discretion is statutorily or constitutionally prescribed, such discretion falls within the compass of judicial review and in para. [112] the Federal Court provided the exception when recognising that art. 145(3) confers a wide discretion on the Attorney General, such discretion is nevertheless not absolute and unfettered, and inappropriate, rare and exceptional cases are amenable to judicial review.

C [33] Using *Sundra Rajoo* by way of analogy, the applicant contended that since the Attorney General's discretion under art. 145(3) of the Federal Constitution is reviewable, more so would the decision of an investigation officer conducting a criminal investigation be amenable to judicial review? However, the applicant failed to appreciate that such discretion can be challenged only in inappropriate, rare, and exceptional cases. The Federal Court said in *Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] 3 CLJ 653:

E This concept is merely a natural extension of *Sundra Rajoo* (*supra*) where this court has held that even the Public Prosecutor's powers are reviewable in the rarest of rare cases.

F [34] Further, the discretion is only reviewable after an applicant has fulfilled the high threshold test as propounded at the leave stage. The issue of amenability to judicial review as enunciated in *Empayar Canggih* and *Latheefa Beebi Koya* does not come into consideration as the ordinary leave test in *WRP Asia Pacific* is not considered. It is the leave test that determines whether a matter is amenable to judicial review or not.

G [35] Taking the case of *Sundra Rajoo* as an example. The applicant cleared the two-stage test. First, illegality was set up and secondly, cogent documentary evidence was adduced to the effect that the then Attorney General knew that Sundra Rajoo was immune from prosecution when his request for *ad hoc* waiver of immunity was denied by the Asian-African Legal Consultative Organization of which Sundra Rajoo was a high officer with immunity under the International Organisations (Privileges and Immunities) Act 1992. The matter was reviewable when notwithstanding the refusal of H *ad hoc* waiver of immunity was refused the then Attorney General proceeded to prosecute Sundra Rajoo.

I [36] Thus, the case of *Sundra Rajoo* does not assist the applicant. The case does not displace the decisions in *Empayar Canggih* and *Latheefa Beebi Koya*, which are binding on this court.

Haris Fathillah

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[37] The third case is *Haris Fathillah*. There, the Federal Court enunciated that while MACC and other criminal investigative bodies “are constitutionally entitled to investigate and the Public Prosecutor to commence criminal proceedings against superior court judges, those powers must be exercised in good faith and only in genuine cases” and opined as follows:

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[69] Any abuse of those powers such as using them for collateral purposes not only constitutes possible offences such as abuse of power or obstruction of justice but also constitutes actionable complaints through the courts' statutory review powers. An apt example of this is the quashing of criminal charges and proceedings initiated by the Public Prosecutor in *Sundra Rajoo Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209.

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[38] Most importantly, the case concerned constitutional judicial review (as opposed to statutory judicial review) seeking to question the scope of powers conferred on the MACC under the Federal Constitution and not a challenge to the exercise of those powers under the law. In that case, the MACC had subsequently announced that it had completed its investigation and had presented its investigation papers to the Attorney General's Chambers. It is premised on these facts that the two following questions before the Federal Court arose: (i) is a serving superior court judge liable to criminal investigations and prosecution in light of the constitutional protections afforded to him under art. 125? and (ii) the manner in which such investigations may be carried out.

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[39] The case was concerned with considerations of the doctrine of separation of powers and judicial independence in constitutional judicial review. In this sense, in view of the *ratio decidendi*, the case of *Haris Fathillah* does not assist the applicant.

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[40] However, there was *dicta* in *Haris Fathillah* to the following effect:

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[68] The appellants have cited cases on the importance of judicial independence. These cases are trite and need not be repeated. The fact is that while the respondents and other *criminal investigative bodies are constitutionally entitled to investigate* and the Public Prosecutor to commence criminal proceedings against Superior Court Judges, *those powers must be exercised in good faith and only in genuine cases*.

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[69] *Any abuse of those powers such as using them for collateral purposes* not only constitutes possible offences such as abuse of power or obstruction of justice, *but also constitutes actionable complaints through the courts' statutory review powers*. An apt example of this is the quashing of criminal charges and proceedings initiated by the Public Prosecutor in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209 (*'Sundra Rajoo'*). (emphasis added)

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- A [41] Thus, taking the case of *Latheefa Beebi Koya*, where it was said that in making decisions in bad faith is reviewable. It appears from the *dicta* in *Haris Fathillah* that any abuse of investigative powers, in my view, is a species of bad faith is actionable by way of the High Court's statutory judicial review powers.
- B The Instant Judicial Review Application
- C [42] In the instant judicial review application, there is no pleading of bad faith or abuse of investigative powers or to any act that falls within the scope of such complaint raised in the O. 53 statement. The exercise of investigative power proceeded upon complaint of wrongdoing by the applicant and the issuance of the freezing orders was done under s. 44(1) of Act 613. In the circumstances, the general principle in *Empayar Canggih* and *Latheefa Beebi Koya* applies. I therefore hold that the issuance of the freezing orders is not amenable to judicial review.
- D [43] For completeness, the applicant relied on two High Court cases, *I-Serve Online Mall Sdn Bhd & Ors v. Bank Negara Malaysia & Ors* [2022] CLJU 2700; [2022] 1 LNS 2700 and *Datuk Kapten (B) Muhammad Suhaimi Yahya & Anor v. Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] CLJU 1150; [2023] 1 LNS 1150; [2023] 5 MLRH 432, which had distinguished *Empayar Canggih*. It suffices to state, that I found no distinguishing factor and in fact, the view
- E that I am bound by the Federal Court decisions, *ie*, *Empayar Canggih* and *Latheefa Beebi Koya* and the Court of Appeal's decision in *Lembaga Minyak Sawit Malaysia & Anor v. Innovans Palm Industries Sdn Bhd* [2023] 3 CLJ 715; [2023] 2 MLJ 742.
- F Legality Of The Freezing Orders
- G [44] Lastly, it was submitted that the investigation officer had acted illegally by issuing the freezing orders as only the Public Prosecutor is empowered to issue the same under s. 50(1) of Act 613. The submission is devoid of merit as was rejected. My reason is as follows. Section 44(1) of Act 613 permits the enforcement agency to issue the freezing order of monies held in accounts in financial institutions while s. 50(1) of Act 613 is for a different purpose, *ie*, seizure of such monies in such accounts. Under s. 50(1) of Act 613, the Public Prosecutor's order is for the investigating officer of the enforcement agency to seize the monies.
- H [45] This is clear from the wording of the sections. Section 44 of Act 613 provides as follows:
- I (1) *Subject to section 50, an enforcement agency may issue an order to freeze any property of any person, or any terrorist property, as the case may be, wherever the property may be, and whether the property is in his possession, under his control or due from any source to him, if:*

- (a) an investigation with regard to an unlawful activity has commenced against that person; and A
- (b) either -
 - (i) the enforcement agency has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been or is being or is about to be committed by that person; or B
 - (ii) the enforcement agency has reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence.
- (2) An order under subsection (1) may include - C
 - (a) *an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order,* D
 - (b) an order to authorise any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require;
 - (c) where custody and control of the property is taken under paragraph (b), an order to authorise any of its officers to sell any frozen moveable property by a public auction or in such other manner as may be practicable if the enforcement agency is of the opinion that the property is liable to speedy decay or deterioration; E
 - (d) an order to authorise any of its officers to hold the proceeds of the sale, after deducting therefrom the costs and expenses of the maintenance and sale of the property sold under paragraph (c); and F
 - (e) an order as to the manner in which the property should be administered or dealt with. G
- (3) In making an order under subsection (1), the enforcement agency may give directions to the person named or described in the order relating to the disposal of the property for the purpose of -
- ...
- (4) *An order made under subsection (1) may direct that the person named or described in the order shall -* H
 - (a) *be restrained, whether by himself or by his nominees, relatives, employees or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;* I
 - (b) not remove from or send out of Malaysia any of his money or property; and

- A (c) not leave or be permitted to leave Malaysia and shall surrender any travel documents to the Director-General of Immigration within one week of the service of the order.
- (5) An order made under subsection (1) shall cease to have effect after ninety days from the date of the order, if the person against whom the order was made has not been charged with an offence under this Act or a terrorism financing offence, as the case may be.
- B ...
- (8) *The enforcement agency effecting any order to freeze any property under this section shall send a copy of the order and a list of the frozen property to the Public Prosecutor forthwith.*
- C (9) *Where the frozen property is in the possession, custody or control of a financial institution, the enforcement agency shall notify the relevant regulatory or supervisory authority (if any), as the case may be, of such order.*
- D (10) Any person who fails to comply with an order of the enforcement agency issued under subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding five times the sum or value of the frozen property at the time the property was frozen or five million ringgit, whichever is the higher, or to imprisonment for a term not exceeding seven years or to both.
- (emphasis added)
- E [46] Whereas, s. 50 provides as follows:
- (1) *Where the Public Prosecutor is satisfied on the information given to him by an investigating officer that any movable property or any accretion to it which is -*
- F (a) the subject matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
- (b) terrorist property;
- (c) the proceeds of an unlawful activity; or
- G (d) the instrumentalities of an offence,
- is in the possession, custody, or control of a financial institution, he may, notwithstanding any other written law, by order direct that such movable property or any accretion to it in the financial institution be seized by the investigating officer or by order direct the financial institution not to part with, deal in or otherwise dispose of such movable property or any accretion to it, in whole or in part, until the order is varied or revoked.*
- H (1A) *The investigating officer effecting a seizure under this section shall forthwith notify Bank Negara Malaysia, the Securities Commission or the Labuan Financial Services Authority, as the case may be, of any order made under subsection (1).*
- I

(2) A financial institution or any agent or employee of a financial institution shall not, on account of complying with an order of the Public Prosecutor under subsection (1), be liable to any prosecution under any law or to any proceedings or claim by any person under any law or under any contract, agreement, or arrangement, or otherwise.

A

(3) ... (emphasis added)

B

[47] Thus, both ss. 44 and 50 show the different roles of the investigation officer and the Public Prosecutor. The role of the Public Prosecutor only arises at the time when the Public Prosecutor makes an order directing the investigation officer to seize the movable property in the financial institution. In the present case, there is only a freezing order issued by the MACC under s. 44(1) of Act 613. There is no seizure order issued to the applicant. Therefore, the applicant's contention is flawed and misconceived in law.

C

Conclusion

[48] For the above reasons, the judicial review application was dismissed.

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